United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Original with affidavit of mailing

76-1221

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1221

UNITED STATES OF AMERICA,

Appellee,

—against—

CARLOS ALBERTO MUNOZ and
LUIS CARDENAS,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
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Eastern District of New York.

ALVIN A. SCHALL,
CAROL B. AMON,
Assistant United States Attorneys,
Of Counsel.

TABLE OF CONTENTS

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Preliminary Statement

Carlos Alberto Munoz and Luis Cardenas appeal from judgments of conviction of the United States District Court for the Eastern District of New York (Platt, *J.*) entered on May 14, 1976, which judgments convicted appellants, after a jury trial, of knowingly and intentionally conspiring together to import into the United States from places outside thereof, and to distribute and possess with intent to distribute, cocaine, a Schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, Sections 846 and 963. On May 14, 1976, appellant Munoz was sentenced to a term of imprisonment of eighteen months and a special parole term of fifteen years. On that same date, appellant Cardenas was sentenced to a three year term of imprisonment and a

fifteen year special parole term. Appellants are presently incarcerated.[1]

The sole argument advanced by appellant Munoz in his brief on appeal is that the evidence was insufficient to support his conviction.[2] Appellant Cardenas claims as error the trial court's failure to dismiss the indictment because of hearsay testimony before the grand jury and the allegedly prejudicial nature of the trial court's charge on accomplice testimony.

Statement of Facts

The Government's principal witness at trial was Jorge Guerrero-Puello, a co-conspirator of the appellants, who entered a plea of guilty on March 12, 1976 to the same single count indictment on which the appellants were tried and convicted. Evidence concerning the conspiracy was also presented through the testimony of agents of the United States Customs Service and the Drug Enforcement Administration.

In January of 1976, Cuerrero, a seaman aboard the "Ciudad Bucaramanga", picked up three kilograms of cocaine in Baranguilla, Colombia, from Herberto Miranda Rodella for delivery to New York. Rodella had supplied

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[1] Marin Gonzalo and Hector Jaramello, named as co-defendants and tried together with appellants, were acquitted by the jury.

[2] Appellant Munoz' second point on appeal was based on an error allegedly made by Judge Platt in his charge. Counsel for Munoz, Thomas O'Brien, has withdrawn this second argument. Mr. O'Brien had been provided with an uncorrected copy of the transcript. This uncorrected copy contained a typographical error in the transcription of the judge's charge. Appellant Munoz' second point on appeal was based on this error. The copy of the transcript which this Court has is a corrected version.

Guerrero with cocaine in the past for similar trips. (T. 163-174).[3] Guerrero met again with Rodella several weeks later in Buenaventura, Colombia, just before sailing to the United States aboard the "Bucaramanga." On that occasion, Rodella detailed to Guerrero instructions for the delivery of the cocaine in New York. He told Guerrero to go to Borough Hall, Brooklyn, on February 10, 1976, and to deliver the cocaine to an individual who would be wearing a blue coat and carrying a yellow paper. Rodella also gave Guerrero two pieces of paper—one, the return address portion of an envelope bearing the name "Eduardo Ayala" and the address 528 East 79th Street, Apartment 4E, New York, New York 10021, and the second, a second piece of paper on which was written the name 'Luis Cordona", the phone number, 212-429-0585 and the same address as on the envelope. Rodella explained that if no one appeared at Borough Hall, Guerrero should call the aforementioned number, and if there was no answer, he should go to the designated address and ask for Ayala and Cordona. (T. 176-182; 221-222; 266).

The "Bucaramanga" arrived in New York on February 8, 1976, at Pier 3 in Brooklyn, New York (T. 165; [illegible]). Two days later, Guerrero exited the ship carrying one kilogram of cocaine in packages sewn into the back hip pockets of his pants. (T. 66). At that time, the other two kilograms were concealed on the ship underneath the bathtub in the infirmary. (T. 182). As Guerrero walked off the "Bucaramanga", he was stopped and searched by Customs Patrol Officer Edward Allen, who discovered the cocaine. (T. 63-70). The two pieces of paper given Guerrero by Rodella were found by Customs Agent Dominic Ciani in Guerrero's wallet. (T. 73; 78; 84-85; 110; 258). Customs Patrol Officer Byron Arnold later searched the infirmary of the "Bucaramanga" and

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[3] References are to pages of the trial transcript.

discovered the remaining two kilograms of cocaine. (T. 79-83; 256).

Subsequent to his arrest, Guerrero agreed to cooperate with agents of the Drug Enforcement Administration (DEA) and to attempt delivery of the cocaine to the recipients in New York under the direction and control of the agents. Following Rodella's instructions, Guerrero, accompanied by DEA agents, went to the Borough Hall area of Brooklyn that day, February 10, 1976. When no one appeared after an hour and a half, Guerrero and Special Agent Juan Rodriguez made several telephone calls to the telephone number given Guerrero, but there was no answer. (T. 86-89; 106-107; 183; 284-285).

That evening, Guerrero went to the Offices of the DEA where he was equipped with a Kel transmitting device. Agent Rodriguez instructed Guerrero that Guerrero should go to the apartment designated on the paper, Apartment 4E, 528 East 79th Street, New York, New York, and attempt to deliver the package of cocaine to Ayala and Cordona. (T. 89-92; 108; 183-186; 215; 290).

Guerrero was driven in an unmarked government car to the 79th Street address by Special Agent Robert Ridler who was acting in an undercover capacity. A portion of the cocaine seized from Guerrero was in a bag in the trunk of the government car. (T. 303-305). Guerrero was greeted at the door of apartment 4E by the appellant Carlos Munoz. (T. 186). Guerrero explained to Munoz that he was from Buenaventura and that he had a package for Eduardo Ayala. Munoz told Guerrero that he and others worked with a guy name "Ayala" but that he was in Colombia. (T. 188; 195). Munoz explained that Ayala had a substitute by the name of "Luis" who would be there later. With reference to the package Guerrero was bringing, Munoz said that they had been

waiting for it. (T. 191-201). Munoz accompanied Guerrero out of the building and to his car. After Guerrero had entered the government vehicle with Agent Ridler, Munoz confirmed with Guerrero that he would contact "Luis" and meet him back at the apartment in an hour. (T. 199; 216-219; 305-307; 340-346).[4]

An hour later, Agent Ridler and Guerrero returned to the vicinity of the apartment building. Guerrero exited the car and entered the building, where he was met in the lobby by appellant Munoz and by Luis Cardenas, who immediately identified himself by name to Guerrero. (T. 201). Cardenas and Munoz were accompanied by two other men, Marin Gonzalo and Hector Jaramillo. (T. 203-201). Cardenas explained to Guerrero that he had gotten the message which Guerrero had given to Munoz earlier and asked Guerrero: "What are you bringing", to which Guerrero explained: "Three." Cardenas then asked how much he owed for the three. (T. 207). Cardenas also explained that he had disconnected the phone at the number which Guerrero had been given by Rodella. (T. 209).[5]

Cardenas then told Guerrero that he was going to get his car and that he would follow Guerrero. He also indicated that some people who could be trusted were coming along. (T. 209). Munoz then returned upstairs,

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[4] The recording of Guerrero's conversations with appellant Munoz was introduced into evidence as Government Exhibit 9. Margarita Mensa, a Spanish Interpreter, testified that she prepared an English transcript of that recording which was introduced into evidence as Government Exhibit 9. (T. 126-131, 192-199).

[5] The recording of Guerrero's conversation with Cardenas was also contained in Government Exhibit 8. A transcript of that conversation prepared by Margarita Mensa was introduced into evidence as Government Exhibit 10. (T. 131-132, 206-210).

and Cardenas, Gonzalo and Jaramillo exited the lobby of the apartment building, entered a brown Plymouth station wagon and pulled up behind the government vehicle occupied by Guerrero and Agent Ridler. (T. 97-98; 348). Upon instruction from Ridler, Guerrero exited the government car and told Cardenas that he wanted to transfer the narcotics right there and not in Brooklyn. (T. 210-212; 310). Agent Ridler then opened the trunk of the car and handed the bag containing the cocaine to Guerrero, who in turn gave it to Cardenas. (T. 211; 347-351). At this prearranged signal, surveilling agents converged on the scene and arrested Cardenas, Gonzalo and Jaramillo. Subsequent to Cardenas' arrest, Agent Ridler found a loaded .38 caliber pistol under the front passenger's seat of the station wagon. (T. 275-276; 308-313; 322-323; 347-357; 362).

At the close of the Government's case both appellants rested without calling any witnesses.

ARGUMENT

POINT I

The trial court properly denied appellant Munoz' motion for a judgment of acquittal.

Appellant Munoz argues that the trial court erred in failing to grant his motion for a directed verdict of acquittal. Although conceding that under one interpretation of the facts the jury could have concluded he was guilty, Munoz claims that inferences could have been drawn from those same facts which were consistent with innocence and that it was thus error for Judge Platt to deny his motion. Appellant's argument finds support in neither the law nor the facts of the case.

In ruling on a motion for a directed verdict, the trial court is not obliged, as appellant argues, to direct a verdict of acquittal where facts equally support inferences of innocence and guilt beyond a reasonable doubt. *United States* v. *Bohle*, 475 F.2d 872, 875 (2d Cir. 1973); *United States* v. *Taylor*, 464 F.2d 240, 243 (2d Cir. 1972). In *Taylor*, the Second Circuit, in discussing the standard to be applied and the judge's function in ruling on a motion for a directed verdict, quoted with approval the following language of Judge Prettyman in *Curley* v. *United States*, 160 F.2d 229, 232-233 (D.C. Cir.), *cert. denied*, 331 U.S. 837 (1974):

> But if a reasonable mind might fairly have a reasonable doubt or might fairly not have one, the case is for the jury; and the decision is the jury's to make. The law recognizes that the scope of a reasonable mind is broad. Its conclusion is not always a point certain, but, upon given evidence, may be one of a number of conclusions. Both innocence and guilt beyond a reasonable doubt may lie fairly within the limits of reasonable conclusion from given facts. . . . If he [the trial judge] concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter.

In *Taylor*, the Court specifically rejected the doctrine that the Government's evidence ". . . must be such as to exclude every reasonable hypothesis other than guilt." *United States* v. *Taylor*, *supra*, at 244.

On appeal, as appellant concedes, the evidence must be viewed in the light most favorable to the Government. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *Tramunti*, 500 F.2d 1334, 1338 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974). A careful examination of

the evidence presented by the Government reveals that it was clearly sufficient to support appellant Munoz' conviction.

On the evening of February 10, 1976, Munoz answered the door at Apartment 4E at 528 East 79th Street, the address given to Guerrero by Rodella, the source of the cocaine in Colombia. In a conversation which was recorded by DEA agents, Guerrero asked Munoz to see Eduardo Ayala, one of the individuals to whom Guerrero had been instructed to deliver the cocaine. Munoz questioned Guerrero extensively as to his identity and his purpose for wanting to see Ayala. Munoz explained to Guerrero that he worked with Ayala and stated: "You can tell me what you bring", suggesting that he could be trusted. When Guerrero asked if there was another person to whom he could deliver the package, Munoz explained that Ayala was in Colombia and volunteered that Ayala had a substitute by the name of "Luis". Significantly, "Luis" was the name of the second individual Guerrero was told by Rodella to contact and the name "Luis Cordona" together with Ayala's name was on the paper seized from Guerrero at his arrest.

Later in the conversation, after Guerrero had explained that he had something for Ayala and that he came from Buenaventura, Munoz replied: "We are waiting for that." Thus, just as there was certainly no question about what Guerrero was bringing there was no question about what Munoz was waiting for. Indeed, Munoz knew exactly what Guerrero was talking about when Guerrero, in referring to going to Brooklyn with "Luis" to pick up the cocaine, said: "No, not now when your partner arrives . . . to go down there the . . . your partner to go down there . . . to the." In responding: "Ah yes, yes, yes I know," Munoz not only accepted the characterization of

"Luis" as his partner, but he also showed that he understood exactly what Guerrero was talking about without the need for any elaboration. To a person unfamiliar and unassociated with the transaction, however, Guerrero's statement would have been a meaningless phrase. After this conversation, Munoz accompanied Guerrero out of the apartment building and concluded by telling Guerrero to return in an hour and that he (Munoz) and "Luis" would be waiting for him.

Approximately an hour later, Guerrero returned and met with Munoz, Luis Cardenas and two other individuals in the lobby of the apartment building. Cardenas explained to Guerrero that he had gotten the message and shortly thereafter he took the package of cocaine from Guerrero.

There was unquestionably sufficient evidence to support the jury's finding that Munoz was a member of the conspiracy with which he was charged. The fact that the word "cocaine" was never used in the conversation between Guerrero and Munoz is insignificant. Indeed, it would be highly unlikely that a person engaged in a clandestine and illegal activity would discuss in concrete terms his illicit business. What is significant is the fact that Munoz questioned Guerrero extensively to satisfy himself that Guerrero was the actual courier the conspirators were waiting for. Moreover, Munoz, who freely accepted Guerrero's characterization of him as Cardenas' partner, admitted that he worked with Ayala and was familiar with Ayala's business—narcotics. This was demonstrated by Munoz' own statement to Guerrero: "We are waiting for that." Munoz did not say that just he (meaning Ayala) was waiting for that. Munoz, by his own statements and actions, indicated that he knew exactly what Guerrero's mission was and that he was intent upon assuring the success of that mission. Further-

more, as he said he would, Munoz brought "Luis" to Guerrero so that the cocaine transaction could be consummated.

We note, only in passing, that there are any number of reasons why Munoz was not physically present at the narcotics delivery. As this Court has noted, *see*, *United States* v. *Agueci*, 310 F.2d 817, 827 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963), it is not uncommon for members of narcotics conspiracies to have different roles to play. What is important here is that Munoz performed *his* vital function in this conspiracy as evidenced by his conversations with Guerrero and by his bringing Cardenas and Guerrero together, and he was present in the lobby of the building when they met.

The evidence of Munoz' involvement in the conspiracy was more than sufficient to support his conviction. In *United States* v. *Calabro*, 449 F.2d 885, 890 (2d Cir.), *cert. denied*, 404 U.S. 1047 (1971), this Court stated that "a seemingly innocent act, when viewed in the context of surrounding circumstances, may justify an inference of complicity."

In *Calabro*, this Court affirmed the conviction of a defendant who had been found guilty of conspiracy to conceal, transport and sell heroin, as well as the substantive charge of concealing, transporting, and selling heroin. The defendant's involvement consisted of his being physically present in a bar on a number of occasions, while in a different area of the same bar, undercover narcotic agents were making arrangements for a purchase of heroin from the defendant's accomplices. The defendant was never personally involved in the discussions, nor did he speak to the agents. The defendant was also seen talking to the heroin seller shortly before narcotics were delivered to the agents, but an

agent testified that the only contact with the defendant involved an incident in the men's room of the bar. One of the agents was standing in the men's room, and when the defendant and a companion passed by, one of them then frisked the agent to assure that the agent was trustworthy. This court held that this was sufficient evidence to link the defendant to the conspiracy.

The evidence of Munoz' criminal involvement was at least as strong as that of the defendant in *Calabro*, if not stronger. In a taped conversation with the government informant Guerrero, Munoz made the statements, "we are waiting for that," and "we work with a guy whose name is Eduardo," (the individual who was supposed to receive the cocaine from Guerrero). Munoz also freely accepted Guerrero's characterization of him as Eduardo's partner. These statements clearly show that Munoz was an active member of the conspiracy. Moreover, Munoz took precautions, as the defendant in *Calabro* did, to assure himself that Guerrero was reliable, by extensively questioning Guerrero as to his identity and purpose in coming to the apartment. It is also significant that Munoz was the individual who had the crucial role of bringing the appellant Cardenas, the recipient of the cocaine, and the informant together, and that he was present when they met in the lobby of the building.

The evidence of Munoz' criminal involvement in this conspiracy was far greater than the evidence against the defendants in *Roberts* v. *United States*, 416 F.2d 1216 (5th Cir. 1969), and in *United States* v. *Ramirez*, 441 F.2d 950 (5th Cir. 1971), cases relied upon by Munoz. In *Roberts*, the defendant associated with conspirators involved in counterfeiting and aided them by destroying counterfeit money. Despite this, the Court

in *Roberts* held that a verdict of acquittal should have been granted. The evidence against Munoz is stronger than the evidence in *Roberts*, since Munoz, in addition to actions that indicated he was a member of the conspiracy, also made several highly significant statements to the government informant Guerrero. When Guerrero went to the apartment to deliver the cocaine, Munoz stated "we are waiting for that," and "we work with a guy who's name is Eduardo." These statements strongly indicate Munoz was an active member of the conspiracy, and this was an important factor that was missing in *Roberts*.

The same distinction can be made in comparing this case with *Ramirez*. In *Ramirez*, the court held that defendant's actions were inconclusive as proof of her involvement in the conspiracy. But in *Ramirez*, as in *Roberts*, the defendant made no statements linking herself to the conspiracy as an active member, as Munoz did in this case.

POINT II

The trial court properly denied appellants' motions to dismiss the indictment.

Appellant Cardenas argues that the trial court erred in failing to dismiss the indictment because it was allegedly based solely on hearsay testimony. The claim is totally without merit.

First of all, as Judge Platt noted, this claim was waived by the failure of either appellant to raise the issue before trial as required by Fed. R. Crim. P. 12(b)(2), (T. 367); *United States* v. *Blitz*, 533 F.2d 1329, 1344 (2d Cir. 1976). A request that the trial

court inspect the grand jury minutes was made for the first time on the second day of trial. (T. 226).[6]

Secondly, even if appellant's claim had been preserved by a timely motion, it fails on the merits. Assuming *arguendo* that, as Cardenas contends, only hearsay evidence was produced before the grand jury, this would not affect the validity of the indictment. Most recently, the Supreme Court in a case upholding the use in the grand jury of evidence seized in violation of the Fourth Amendment restated the basic principle that ". . . an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence." *United States* v. *Calandra*, 414 U.S. 338, 345 (1974). *See also*, *United States* v. *Blitz*, *supra*, at 344; *United States* v. *James*, 493 F.2d 323, 326 (2d Cir.), *cert. denied*, 419 U.S. 849 (1974). More specifically, in *Costello* v. *United States*, 350 U.S. 359, 363 (1956), the Supreme Court held that an indictment may permissably be based solely on hearsay. *See also*, *Lawn* v. *United States*, 355 U.S. 339 (1958). This rule has been qualified in the Second Circuit to the extent that indictments will be dismissed where a hearsay account of a transaction is presented to the grand jury as if it were eyewitness testimony. *See*, *United States* v. *Estepa*, 471 F.2d 1132, 1136 (2d Cir. 1972). *United States* v. *Ramirez*, 482 F.2d 807, 811 (2d Cir.), *cert. denied*, *sub nom Gomez* v. *United States*, 414 U.S. 1010 (1973). However, neither appellant makes any such claim on this appeal.

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[6] At that point, the minutes had not as yet been transcribed because the superseding indictment on which appellants were tried had been returned only the week before trial. Although the Government had requested of the grand jury reporter that the minutes be transcribed as soon as possible, there being no motion directed to grand jury minutes, the United States Attorney's Office did not incur the undue expense of having them transcribed on an immediate basis.

In his brief, in what appears to be the crux of his argument, appellant Cardenas denounces the failure of the Government to call Guerrero to testify before the grand jury, apparently on the grounds that the defense was thus deprived of impeaching material. Apart from the fact that this claim based on the most tenuous speculation—namely, the assumption that Guerrero would have lied in the grand jury—this Court has had no difficulty in rejecting claims similar to appellant's. In *United States* v. *Payton*, 363 F.2d 996 (2i Cir.), *cert. denied*, 385 U.S. 993 (1966), at 999, this Court stated:

> However, appellant has taken a rule of access formulated to expose inconsistencies and has turned it upside down to prove a requirement that witness appear before a grand jury so that an inconsistency may be created. This argument is a non sequitur. We will continue to hold, of course, that a defendant may prove inconsistencies at trial with prior statements to a grand jury; we do not hold that a defendant may require prior statements to a grand jury simply to create inconsistencies at trial.[7]

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[7] We will make the transcript of the grand jury's proceedings available for *in camera* inspection, should the panel which hears this case wish to examine it.

POINT III

The trial court's charge regarding accomplice testimony was proper.

With respect to accomplice testimony, Judge Platt charged the jury as follows:

> An accomplice does not become incompetent as a witness because of participation in the crime charged. On the contrary, the testimony of an accomplice alone, if believed by the jury, may be of sufficient weight to sustain a verdict of guilty, even though not corroborated and supported by any other evidence. However, the jury should keep in mind that such testimony is always to be received with great caution and weigh it with great care. You should never convict a defendant upon the unsupported testimony of an alleged accomplice, unless you believe that unsupported testimony beyond a reasonable doubt. The law does not prohibit the use of accomplice testimony, whether you approve of their [sic] use is not to enter into your consideration in this case. In certain types of cases the Government is out of necessity compelled to rely on testimony of accomplices or persons with criminal records or informers; otherwise it would be difficult to detect or prosecute some wrongdoers, and this particularly is true in conspiracy cases, and the Government has no choice in the matter, it must take the witnesses to the transaction. As a universal rule in the federal courts, a defendant may be convicted on testimony of an accomplice standing alone, if you believe such testimony beyond a reasonable doubt. This would still be so even though the accomplice was a confirmed criminal. (T. 490-491).

Citing no authority in support of his position, appellant Cardenas claims that the above charge was unduly prejudicial because: (1) in referring to the need for accomplice testimony, the Court allegedly indicated approval of the Government's approach to the prosecution of the case; (2) the Court's treatment of the rule that such testimony is to be received with great care was superficial; and (3) the Court somehow enhanced the credibility of the Government's accomplice by using the term "confirmed criminal" in the last sentence of the above quoted portion of the charge. Appellant's arguments are readily disposed of.

To begin with, the trial court's charge on accomplice testimony, including that portion dealing with the necessity for such testimony, was identical to a charge given by Judge Weinfeld of the Southern District of New York and approved by the Second Circuit in *United States* v. *Corallo*, 413 F.2d 1306, 1322 (2d Cir.), *cert. denied*, 396 U.S. 958 (1969). Similarly, the following charge, which is equally as explicit on the question of the need for accomplice testimony, was found proper in *United States* v. *Projansky*, 465 F.2d 123, 136, n. 21, 25 (2d Cir.), *cert. denied*, 409 U.S. 1006 (1972):

> In the prosecution of crime the Government is often called upon to use witnesses who are accomplices in the commission of the crime itself. This is particularly so in cases of conspiracy. Conspirators do not publicly proclaim their intentions to operate openly. It often happens that only members of the conspiracy have evidence which is relevant to and important in the case.

References by the trial judge to the Government's need to use accomplice testimony in conspiracy cases

clearly do not, as appellant argues, constitute impermissible advocacy by the court. *United States* v. *Bartlett*, 449 F.2d 700, 705 (8th Cir. 1971); *United States* v. *Curry*, 471 F.2d 419, 422 (5th Cir.), *cert. denied sub nom. Ciralo* v. *United States*, 411 U.S. 967 (1973).

Moreover, in cautioning the jury concerning its evaluation of accomplice testimony, Judge Platt instructed the jury that it "should keep in mind that such testimony is always to be received with great caution and weigh it [sic] with great care." Although appellant argues that this instruction was superficial, the Second Circuit has held that this exact wording is sufficient to apprise the jury of the added scrutiny required of accomplice testimony and has stated that a charge more favorable to the defendant on this point is not required by law. *United States* v. *Mattio*, 388 F.2d 368, 370 (2d Cir.), *cert. denied*, 390 U.S. 1043 (1968); *United States* v. *Vita*, 294 F.2d 524, 526 (2d Cir. 1961), *cert. denied*, 369 U.S. 823 (1962). The fact that one out of four defense attorneys was inattentive and missed the cautionary instruction is totally irrelevant to a determination of whether or not Judge Platt's charge was correct. (T. 500-501).

Finally, appellant argues, illogically, that since Guerrero, the accomplice witness, stated he had no prior criminal record, the only inference to be drawn from the statement of the Court concerning "confirmed criminal" was that Guerrero's testimony was better than that of a "confirmed criminal". First of all, the Court was stating nothing more than the well-stated legal principle that in federal court, a defendant may be convicted on the uncorroborated testimony of an accomplice, if such testimony is believed beyond a reasonable doubt. He went on to state that this is true even though an accomplice may be a confirmed criminal, i.e., being a confirmed criminal does not make a witness incompetent to testify.

Since Guerrero was the only accomplice who testified at trial, if anything, the inference to be drawn from the trial judge's charge was that he thought Guerrero was a confirmed criminal. It would be doubtful too if the jury came to any other conclusion in view of Guerrero's testimony that over a four year period he imported twenty kilograms of cocaine into the United States.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

Dated: August 30, 1976

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*Of Counsel.**

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* The United States Attorney Office wishes to acknowledge the valuable assistance of William McGuire in the preparation of this brief. Mr. McGuire a third year student at St. John's University School of Law.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 2nd day of September 1976 he served ~~a copy~~ two copies of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Thomas J. O'Brien, Esq.
2 Pennsylvania Plaza
New York, N. Y. 10001

Richard L. Rosenkranz, Esq.
66 Court St.
Brooklyn, N. Y. 11201

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~Washington Street~~ 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

LYDIA FERNANDEZ

Sworn to before me this
2nd day of September 1976

Carolyn N. Johnson

CAROLYN N. JOHNSON
Notary Public, State of New York
No. 41-[illegible]
Qualified in Kings County
Term Expires March 30, 1977